No. 81257-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DON L. FITZPATRICK and PAM FITZPATRICK, husband and wife; BRAD STURGILL and HEATHER FITZPATRICK STURGILL, husband and wife,

Respondents,

OKANOGAN COUNTY,

Petitioner,

THE STATE OF WASHINGTON; JOHN L. HAYES and JANE DOE HAYES, husband and wife; and METHOW INSTITUTE FOUNDATION,

Defendants.

FITZPATRICK'S ANSWER TO PLF AMICUS BRIEF

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The amicus curiae brief by Pacific Legal Foundation (PLF) focuses on one issue—that is, is there a "state of mind" element required to be proven in an inverse condemnation case? PLF correctly shows that modern jurisprudence in Washington, California, and at the federal level, has rejected notions that takings liability requires that government "contemplate" or "intend" to cause the private property damage.

This response by Fitzpatrick will be very brief—highlighting the **key aspect** of three Washington cases. Then, Fitzpatrick will focus on *Hansen v. United States*, 65 Fed. Cl. 76 (2005), a case that is directly on point and warrants study.

In Washington, the **tort-taking distinction** rests primarily on the *degree of interference* resulting from the government activity. After overruling inconsistent earlier cases (notably *Jorguson v. City of Seattle*, 80 Wash. 126, 141 P. 334 (1914)) this Court in *Wong Kee Jun v. Seattle*, 143 Wash. 479, 255 P. 645 (1927) held:

> [T]he courts must look only to the taking, and not to the manner in which the taking was consummated. A mere **temporary interference** with a private property right in the progress of the work, especially such as might have been avoided by due care, **would probably be tortious only**. Improper blasting, causing debris to be cast upon the adjacent property, would seem to be tortious and not a taking or damaging under the Constitution, but the removal of lateral support, causing slides or any **permanent** invasion of private property, must be held to come within the constitutional inhibition.

Id. at 505 (emphasis added).

Subsequently, in *Boitano v. Snohomish County*, 11 Wn.2d 664, 120 P.2d 490 (1941), this Court adhered to the rule in *Wong Kee Jun*. In *Boitano*, the government operated a gravel pit which resulted in flooding of a portion of the plaintiffs' nearby land. There was no plan of action that anticipated the flooding. There was no intent to flood the plaintiffs' property. *Id.* at 673 ("the flooding of their land was not an indispensable and intentional part of any improvement project carried out according to a plan which necessarily anticipated such flooding or contemplated that it should be done."). Under these facts, the Court ruled that it was a "perfect illustration of the rule of the *Wong Kee Jun* case." *Id.* at 677. Accordingly, the takings claim for compensation was proper because there was a "**permanent invasion** of private property." *Id.* (emphasis added). It made no difference that the government did not plan, anticipate, intend, or foresee that its operation would cause flooding of the nearby property.

PLF's brief is very helpful in setting forth the history leading up to *Wong Kee Jun*, however, a key subsequent case should also be highlighted. In *Olson v. King County*, 71 Wn.2d 279, 428 P.2d 562 (1967) a takings claim was brought where private property had been inundated with rocks, dirt and debris. While creating a mess that needed to be cleaned up, there was no

permanent damage. The problem was caused by an outfall from a culvert that was installed without protection for erosion. As the Court stated:

> This is not a case of a culvert being unable to carry the runoff with resulting flooding. Indeed, the maximum amount of water carried by the culvert was only two-thirds of its capacity. Had the County done what good engineering practices required—provided a splash apron or hardsurface material to carry the water from the outfall to the base of the slope—the plaintiffs would have sustained no damage. As indicated, it was the material eroded from the embankment which caused the damage.

Id. at 282-83.

In light of these facts, this Court applied *Wong Kee Jun*.

> The present case falls into the category referred to in *Wong Kee Jun* as a "mere **temporary interference** with a private property right such as might have been avoided by due care."

Id. at 285 (emphasis added). Accordingly, the facts presented a tort, not a takings claim. In contrast to *Olson* and a "mere temporary interference," the Fitzpatrick property has been completely and permanently destroyed.

Fitzpatrick does agree that causation must be established between the government activity and the damage to private property. However, causation is a factual issue that should be determined **objectively**. Fitzpatrick met this burden of establishing causation with the expert testimony of Dr. Jeff Bradley. In contrast, the State and Okanogan County in the present case seek to inject **subjective** elements rooted in tort law (such as intent or

foreseeability) into the takings analysis.

The Court is urged to study carefully *Hansen v. United States*, 65 Fed. Cl. 76 (2005). This very scholarly opinion by Judge Block details the history and gradual changes in the law regarding the tort-takings distinction. It is a thorough and persuasive treatment of the issue. Significantly, the bottom line is consistent with Washington law that focuses on the degree of interference with the private property.

> The real key to the distinction between mere torts (other than nuisance) and takings by the government is the **substantiality of the harm**, not the nature of the actions leading to that harm.

Id. at 101 (emphasis added).

Judge Block explains that early federal cases proceeded under an implied contract theory (*i.e.* an implied promise to pay compensation for takings). This approach brought subjective intent elements into the earlier takings cases. *Id.* at 96. However, that approach became unnecessary and takings claims later could be brought to the court simply on the Fifth Amendment itself. Judge Block explains:

> Predicating takings jurisdiction on the Fifth Amendment rather than implied contracts is significant because there is **no subjective element of a Fifth Amendment claim**. Instead, it establishes a right to compensation for property taken by the government for public use, **unconditioned by a state of mind requirement**.

Id. at 110 (emphasis added).

Among other cases, Judge Block discusses the United States Supreme Court decision in *Portsmouth Harbor Land & Hotel Company v. United States*, 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287 (1922).

> *Portsmouth* effectively concluded that the government's "intent" to make use of a plaintiffs' property could be proven through a **causation** analysis, relying on **objective standards** instead of the government actors' subjective intentions or knowledge. ... Implicitly, the focus of the *Portsmouth* decision was upon the acts that lead to a taking themselves—an objective standard of causation. The emphasis is almost exclusively on the **character of the harm** and **simple causation**; what the government should have foreseen or subjectively intended simply was not determinative in the Court's analysis.

65 Fed. Cl. at 111 (emphasis added).

In the present case, the State and Okanogan County have put forth no evidence regarding causation. In contrast, the Fitzpatrick family submitted the report of Dr. Bradley. He concluded that the change in the river's course was caused by a dike that blocked off several well-defined natural watercourses that were side channels to the main stem of the river. By cutting off those side channels, the water could no longer flow through its natural watercourses and thereby caused the avulsion. Dr. Bradley explained:

> [T]here are several **naturally defined side channels, or watercourses**, in the right floodplain of the Methow River in the vicinity of the dike. These side channels relieve flow from the main channel as the water level rises during a high flow event.

CP 132-133. Allowing access to the side channels would have reduced the energy, velocity, flow and erosive power of the main channel. *Id.* Dr. Bradley's testimony concludes:

> By allowing the river to access these natural side channels, it would have been able to meander more naturally and the **avulsion** that occurred in 2002 **would not have occurred**.

CP 133. Accordingly, the undisputed evidence establishes the causation link between the dike and the destruction of Plaintiffs' property.

The fact that the government defendants did not study in advance the engineering principles at issue, and did not consider what the effects might be of cutting off these natural side channels, can be no basis for avoiding liability.

To the extent the government defendants desire to argue there was some other cause of the avulsion, that is a factual dispute. Of course, factual disputes are resolved through trial, not summary judgment. Accordingly, the Court of Appeals' decision to remand the case for trial should be affirmed.

RESPECTFULLY submitted this 14th day of May, 2009.

GROEN STEPHENS & KLINGE LLP

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DECLARATION OF SERVICE

I, Linda Hall, declare:

I am not a party in this action. I reside in the State of Washington and am employed by Groen Stephens & Klinge LLP in Bellevue, Washington.

On May 14, 2009 a true copy of the foregoing Fitzpatrick's Answer to PLF Amicus Brief was transmitted via e-mail and placed in envelopes, which envelopes with postage thereon fully prepaid was then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Bellevue, Washington, addressed to the following persons:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 14th day of May, 2009 at Bellevue, Washington.

/s/ Linda Hall
Linda Hall